



Chapter Title: A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage

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A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage**

1. Introduction

On August 15, 2015 Pope Francis put his signature to new norms reforming the process for the declaration of the nullity of a marriage. The *motu proprio* *Mitis Iudex Dominus Iesus* for the Latin Church and the distinct *motu proprio* for the Oriental Catholic Churches were made public on 8 September 2015 and came into force on December 8, 2015. The following exposition concerns only the *motu proprio* for the Latin Church, but the one for the Oriental Churches is very similar to it.

After a short preliminary part that concerns especially the state and activity of ecclesiastical tribunals in the world, there follows a brief presentation of the *motu proprio*, and in the third part I will consider more closely the intention behind the reform and some of its key points, comparing them with the Final Report of the Extraordinary General Assembly of the Synod of Bishops of 2014. It should be clear, however, that it is too early for an in-depth study of the matter. Hence I consider my exposition only a first approach.

* Archbishop-Secretary of the Supreme Tribunal of the Apostolic Signatura, Vatican City.

** Revised text of a lecture given on February 26, 2016 at the Katholieke Universiteit Leuven in Leuven.

2. Some Preliminary Considerations.

2.1. According to the last published *Statistical Yearbook of the Church* in 2013 a total of 41,721 cases of marriage nullity were brought to conclusion in the first instance by the ordinary process: 33,438 received an affirmative decision and 3,460 received a negative sentence, while the rest ended through renunciation or abatement. In second instance, 21,007 decrees confirming the affirmative decision of the first instance were issued, in addition to 7,471 affirmative and 1,106 negative sentences. Of the 33,438 affirmative sentences in the first instance, 16,550 were issued in North America, 8,483 in Europe, 3,210 in South America, 2,906 in Asia, 1,469 in Central America (including Mexico and the Antilles), 460 in Africa, and 360 in Oceania.

In comparison with 1993, there was a significant growth in the number of affirmative sentences in Asia (from 787 to 2,906) and South America (from 1,033 to 3,210), while even the relatively low number of sentences in Africa more than doubled (from 213 to 460). There was almost a doubling in Central America (from 762 to 1,469) and some growth in Europe (from 6,372 to 8,483). By contrast, there was an enormous reduction in North America (from 40,664 to 16,550) and Oceania (from 864 to 360). Such a reduction also occurred in Belgium (from 204 to 53) and in Great Britain (from 1,141 to 437), while in Italy there was a significant growth (from 1,172 to 2,157), without doubt the result of a serious effort to make ecclesiastical tribunals more accessible, also with respect to the cost of the process and obtaining canonical advice.¹

2.2. The interpretation of the statistical data is not all that easy. However, based on these and more detailed data, and also through almost thirty years of experience in monitoring the status and activity of the tribunals throughout the entire Catholic Church, I can affirm the following:

- The total number of cases of nullity of marriage throughout the world indicates that this is not an insignificant phenomenon, nor a purely academic one, but rather a reality which must not be underestimated.
- In some parts of the world the faithful have very limited access, and often no access at all, to a process for adjudicating the nullity of their

1. Cf. *Statistical Yearbook of the Church* 1993 (Vatican City: Libreria Editrice Vaticana, 1995) 403–405; *Statistical Yearbook of the Church* 2013 (Vatican City: Libreria Editrice Vaticana, 2015) 438 and 443.

marriage. As an aside, a parish priest in South America recently told me that he often advises the faithful to present their case to the inter-diocesan tribunal, but that they almost never do so, due to the distance of the tribunal and the cost of the process.

- In countries where ecclesiastical tribunals are functioning and accessible, there is a great difference in the number of cases of marriage nullity and of affirmative sentences. Some causes of this phenomenon may be, for instance, the stability or reduction of the number of canonical marriages, the closeness to or growing distance from Church structures, or the presence or absence of attention to the possibility of presenting a case to the tribunal as part of the pastoral outreach for so-called broken marriages.

2.3. The quality of the administration of justice is also very different from region to region, and sometimes even from tribunal to tribunal. There remain a number of tribunals of low quality, which, due to poor understanding and a lack of improvement in their praxis, continue with a rather superficial jurisprudence. Such tribunals seem to consider the process for the declaration of nullity of a marriage an easy way to give a new chance to those in broken marriages, as if the mere fact of a broken marriage were evidence of its invalidity. Surely, for a good number of broken marriages a serious investigation into whether they are invalid is appropriate, but I do not think that this is the case for the large majority of such marriages, unless we no longer take the marriage bond seriously. On the other hand, I strongly believe that many more marriages could rightly be declared invalid, if the faithful in every place had the actual possibility of availing themselves of the service of an ecclesiastical tribunal.

3. Brief Presentation of the *Motu Proprio Mitis Iudex Dominus Iesus*

3.1. Most likely with an eye to the *Instrumentum Laboris* for the Extraordinary General Assembly of the Synod of Bishops of 2014 (artt. 98–102), Pope Francis, on August 27, 2014,² constituted a Special Commission for studying the reform of the canonical marriage process. The President of the Commission was Monsignor Pio Vito Pinto, Dean of the Roman

2. Cf. “Per la riforma del processo matrimoniale canonico,” *L'Osservatore Romano*, September 21, 2014, 1.

Rota. In May 2015 this Commission presented the result of its work. Pope Francis then consulted four other experts in the matter and on August 15, 2015 signed the reform of the process for the declaration of the nullity of marriage. In this way, even before the Ordinary General Assembly of the Synod of Bishops of 2015, he responded to the “need to make the procedure in cases of nullity more accessible and less time-consuming, and, if possible, at no expense,” as expressed in its *Instrumentum laboris*, n. 114, which in fact took up n. 47 of the 2014 Final Report.³ The reform is clearly an exercise of the personal and supreme jurisdiction of the Roman Pontiff, even if he sees it as a service rendered to his brother bishops in a spirit of collegiality.

3.2. In the introduction of the *motu proprio*, Pope Francis stresses the need to protect the unity of faith and discipline regarding marriage and his intention of not introducing provisions that favor nullity, but rather those that favor the speediness of the process, along with an appropriate simplicity. In fact, charity and mercy require the Church, as a mother, to make herself closer to her children who consider themselves separated. Pope Francis clearly has in mind that a declaration of marriage nullity can offer a solution to many more cases than those actually examined by Church tribunals.

3.3. The Supreme Pontiff mentions then “a few fundamental criteria . . . that have guided the work of reform.” In my opinion, several of these fundamental criteria are not so much guidelines for the work of reform as they are its key points. Moreover, some of the fundamental criteria did not influence the new body of canons, but instead appear to be indications for the application of the new canons. The fundamental criteria can be summarized as follows: the abolition of the need of a double conforming sentence in favor of the nullity of marriage; the faculty of the bishop-moderator of a tribunal to commit cases to a single judge (with two assessors, insofar as possible); the bishop himself as judge, especially in the briefer process, which now, alongside the ordinary process and the documentary process, has been introduced as a third distinct form of matrimonial process; the emphasis on appealing to the metropolitan

3. Nn. 114 and 116 of the *Instrumentum laboris* quote nn. 47–48 of the Final Report of the Extraordinary Synod, adding in nn. 115 and 117 some comments.

see as the ordinary appellate tribunal; the proper task of conferences of bishops in providing help for implementing the reform of the matrimonial process—which also concerns expenses, seeing to it that, insofar as possible, cases are handled free of charge; the possibility, in any event, of an appeal to the Holy See; the issuing of a separate *motu proprio* for the Oriental Churches.

3.4. The *motu proprio* presents then a new redaction of canons 1671–1691 of the 1983 Code of Canon Law concerning the special process for the declaration of marriage nullity. This new legislation entered into force on December 8, 2015. Several canons, however, have not been changed, except perhaps in their numbering or in their becoming a paragraph within a canon.⁴ The most important changes seem to be the following:

- The tribunal of the quasi-domicile of the petitioner is now also competent to hear the case, while the restrictions for the tribunal of the domicile of the petitioner or that of most of the proofs are abolished (can. 1672). Things now being so, it will be necessary to determine carefully whether an asserted quasi-domicile is in fact truly established and to take care to protect the respondent's right of defense. I remember well the reaction from Latin America years ago against a similar norm then in use in the United States of America.⁵
- A college of judges can be composed of a presiding clerical judge and now two lay judges (can. 1673 §3); the bishop-moderator of a tribunal of first instance can entrust cases to a single clerical judge, if possible with two assessors (can. 1673 §4). In both cases a prior intervention of the conference of bishops is no longer required.
- The judicial vicar, admitting the *libellus*, decides whether the case is to be treated with the ordinary process or with the briefer process (can. 1678 §§12).
- The norm concerning the possibility that a judicial confession and the declarations of the parties might constitute full proof (can. 1678 §1) is not only presented in a more positive way, but also omits the

4. Cf. Philippe Toxé, "La réforme des procès en nullité de mariage en Droit canonique latin," *Nova et vetera* 15 (2015) 377–396, see 378.

5. See, v.g., Zenon Grocholewski, *Documenta recentiora circa rem matrimonialem et processualem* (Rome: s.n., 1980) 2: 123–125 for a reply of the Apostolic Signatura of March 3, 1978 to a request of the "Asociación Mexicana de Canonistas" in this matter.

introductory clause of the former can. 1679: "Unless there are full proofs from elsewhere." This way of proving the nullity of a marriage is thus no longer only a subsidiary one, but may also be used when full proof could be obtained otherwise, notwithstanding, of course, the obligation to reach moral certainty for a declaration of nullity.

- The sentence that first declared the nullity of the marriage, once the time limits for appeal have lapsed, becomes executive (can. 1679).
- If the appeal after an ordinary process clearly appears merely dilatory, the collegial appeal tribunal is to confirm the sentence by decree (can. 1680).
- A briefer process before the bishop is introduced under certain conditions (cann. 1683–1687).

Since this new legislation about the special process for the declaration of the nullity of marriage (can. 1691 §3), with due respect for its proper nature, refers, as before, to the canons on trials in general and the ordinary contentious trial, the Instruction *Dignitas connubii*, though never mentioned in the *motu proprio*, continues to be in force, except for the articles of the aforementioned Instruction that explained canons of the former legislation, now modified and no longer present in the new norms,⁶ and also those articles that do not conform with the procedural rules attached to the *motu proprio*. In the interpretation of *Dignitas connubii*, one should moreover take into account the fundamental criteria of the reform.

3.5. Pope Francis then states that the suppression of the need for a double conforming sentence will apply to affirmative sentences published starting from the day the *motu proprio* comes into force, that is, from December 8, 2015. Every affirmative sentence published from that day on, and not appealed in due time, became immediately executive. It should be noted that a sentence is not considered published until it has been published to all the parties, including the defender of the bond, according to the norm of law.

The Holy Father continues by saying that he is attaching⁷ procedural rules for the proper and accurate implementation of the *motu proprio*, which must be observed diligently. After this statement follows the formula giving force to the *motu proprio*, a formula that in my opinion left

6. Cf. Toxé, 378–379.

7. One of the English versions of the *Motu proprio* I consulted says about those rules: "Attached and made part hereof [the *Motu proprio*]," but neither the Latin text nor the Italian contain "and made part hereof."

no doubt that any and whatsoever provision to the contrary, even “worthy of most special mention,” was suppressed. Whether or not this formula refers also to the attached procedural rules has become a point of discussion among canon lawyers. At any rate, being administrative rules, although issued by the Supreme Pontiff himself, it must be supposed that they cannot modify the strictly legislative part of the *motu proprio*, the new body of cann. 1671–1691.

3.6. The twenty-one attached procedural rules do not intend to explain the whole process in its entirety, but to illustrate the main legislative innovations and, where appropriate, to complete it. I offer only a brief and incomplete survey:

- Artt. 1–5 of the attached procedural rules concern the pre-judicial or pastoral investigation. The Final Report of the Extraordinary General Assembly of the Synod of Bishops (in n. 49) called for “specially trained counsellors who would be able to offer free advice to the concerned parties on the validity of their marriage. This work could be done in an office or by qualified persons (cf. DC, art. 113, 1).” I welcome the fact that this previous investigation, already called for by art. 113 §1 of *Dignitas connubii*, is to be carried out outside the tribunal itself, thereby avoiding the incongruity that a tribunal would somehow pronounce upon the *fumus boni iuris* of a case before it is formally introduced. Much will depend on the implementation of this pre-judicial or pastoral consultation for the success of the reform of the process. This has to be, in the mind of Pope Francis, an important part of the pastoral care of broken marriages. The implementation of this pastoral approach will remain a serious challenge for diocesan bishops.
- The titles of competence being equivalent, nevertheless the principle of proximity between the judges and the parties is raised (art. 7 §1). Such proximity would indeed foster the speed of the process. There are, however, no procedural means to enforce said proximity.
- Cooperation between tribunals (cf. can. 1418) should ensure that parties and witnesses can participate in the process with a minimum of financial cost (art. 7 §2). I hope that individual dioceses will take to heart this duty of cooperation, because sometimes the lack of cooperation very seriously delays the instruction of a case.⁸

8. Some examples may illustrate this point: A judicial vicar in Argentina sent, together with the annual report for the year 2013 submitted to the Apostolic Signatura (prot. n. 2019

- That a bishop who is able to constitute a working tribunal with qualified ministers may withdraw from an interdiocesan tribunal (cf. art. 8 §2) is, at least for the Apostolic Signatura, nothing new.⁹
- Artt. 9–13 and 21 repeat, at least substantially, either canons still in force or the norms of *Dignitas connubii*; artt. 14–20, concerning the briefer process before the bishop, will be considered, as far as necessary, further on.

3.7. In *L'Osservatore Romano* of November 8, 2015 there appeared a rather peculiar note stating that the Holy Father had asked the Dean of the Roman Rota to explain the mind of the supreme legislator concerning the *motu proprio*, in order to offer definitive clarity. This was done in two points, the first being a repetition of art. 8 §2 of the procedural rules on the faculty of a diocesan bishop to withdraw from an interdiocesan tribunal of first instance; the second asserting, *inter alia*, the faculty of two or more metropolitan bishops to constitute even interdiocesan tribunals of second instance, an assertion that does not correspond to the competence of conferences of bishops according to can. 1439, which was confirmed in can. 1673 §6 of the *motu proprio*.

As this note, however, did not bring definitive clarity, Pope Francis then issued on December 7, 2015 a Rescript on the implementation and observance of the new law on the matrimonial process, stating that it abrogates or derogates any contrary law or norm, even if approved *in forma specifica*, citing as an example the document *Qua cura* of Pius XI for Italy. The greatest part of the Rescript, notwithstanding its inscription, does not deal with the new law, but rather gives norms for the Roma Rota. Although the question of the abrogation or derogation of *Qua cura* concerns only Italy, I must observe that the Italian regional tribunals were serving the faithful very well and that subsequent to the new legislation there is now significant confusion in several places, and indeed not only in Italy, because

SAT), copies of seven unanswered solicitations forwarded in the past two years to another judicial vicar for the interrogation of two witnesses presented by the petitioner; similarly, in a letter dated 16 December 2015, the judicial vicar of an Italian regional tribunal requested the intervention of the Apostolic Signatura, because, notwithstanding several solicitations, a diocesan judicial vicar, after two years, had not yet answered a request for the judicial interrogation of a witness presented by the respondent (prot. n. 51234/15 VT).

9. Except for Italy, where the *motu proprio Qua cura* of Pius XI excluded the competence of diocesan tribunals for cases of nullity of marriage.

some have thought (and maybe continue to think) that the regional tribunals were abolished by the new legislation, without having a new working structure to replace them.¹⁰

4. The Intention and Some Key Points of the *Motu Proprio*

Paying attention to the Final Report of the Extraordinary General Assembly of the Synod of Bishops of 2014, this third part of the exposition offers some commentary on the introduction of the *motu proprio* and several of the fundamental criteria.

4.1. No Administrative Process Is Introduced, Since a Judicial Process Offers the Best Guarantees for Discovering the Truth Concerning the Indissoluble Marriage Bond

In the Final Report (*Relatio Synodi*) of the Extraordinary General Assembly of 2014 (n. 48) we find the proposal “of establishing an administrative means under the jurisdiction of the diocesan bishop” for the declaration of nullity of marriage, with the remark that “[s]ome synod fathers, however, were opposed.” Pope Francis states in the introduction of the *motu proprio* that he has issued it “following in the footsteps of our predecessors who wished cases of nullity to be handled in a judicial rather than an administrative way, not because the nature of the matter demands it, but rather due to the unparalleled need to safeguard the truth of the sacred bond: something ensured by the judicial order.” Pope Francis stresses indeed the indissolubility of marriage and the necessity that Church discipline be in conformity with this truth of faith. He writes that the reform commission therefore had prepared a proposal “upholding and keeping in first place the indissolubility of marriage.” The reform of the process for the declaration of marriage nullity thus aims to protect “the unity of faith and discipline regarding marriage, the cornerstone and origin of the Christian family.” Hence, Pope Francis has no intention “to introduce . . . provisions that favor the nullity of marriage.”

10. The document Tribunale Apostolico della Rota Romana, *Sussidio applicativo del Motu pr. Mitis Dominus Iesus* (Vatican City: January 2016), was sent by the Dean of the Roman Rota on January 26, 2016 to the diocesan bishops of Italy, telling them that “si è provveduto per Superiore disposizione ad approntare un *Sussidio applicativo*.”

The process for the declaration of marriage remains, therefore, a judicial process, not because this necessarily has to be so, but because it is the most suitable way to reach a decision based on the truth of whether the marriage bond exists. The judicial process indeed offers the best guarantees for protecting the marriage bond. For this reason, the *motu proprio* does not comply with the wishes of several members of the Extraordinary General Assembly of the Synod of Bishops to introduce an administrative process.¹¹ It should be noted, however, that they were most probably referring to a simple administrative procedure before the diocesan bishop (along the lines of cann. 50–51, for example), in order to ascertain the truth about the marriage, and not to an administrative process in order to arrive at a decision *ex aequo et bono* about what is prudently opportune and desirable in the given circumstances, whether or not this conforms to the truth. Indeed, the Final Report tells us a few lines later, in the same n. 48, that “the synod fathers emphasized the primary character of ascertaining the truth about the validity of the marriage bond.”

As I have already said, the goal of the reformed process remains the discovery of the truth concerning the marriage bond, insofar as this is humanly possible. The introduction to the December 7, 2015 Rescript,

11. Cf. Frans Daneels, “Observations on the Process for the Declaration of Nullity of Marriage,” *Forum* 11 (2000) 467–477, see 472–473: “The structure of the judicial process for the declaration of nullity of marriage is very logical and rather simple. There are, however, those who have suggested that the said process may some day in the future be able to be handled through the administrative process rather than judicial. [. . .] On the one hand, it does not seem that the process for the declaration of nullity of marriage must by its very nature be a judicial one [. . .] On the other hand [. . .] it would appear that the judicial process is normally much more suited to a process for the declaration of nullity. [. . .] In any case, any eventual—although in reality improbable—administrative procedure in such a weighty matter would have to be serious. It could not prescind from the definition of the object of the investigation [. . .], from the real possibility of guaranteeing to those directly involved in and affected by the case—that is, the spouses—of intervening in the procedure, from a reliable means of collecting the proofs and from the discussion of those proofs, from the critical evaluation of the proofs which have been gathered by the one who is to make the decision, and also from the required moral certainty which that person must have in order to declare the nullity of marriage. Everything considered, such a procedure would not be very different from the present judicial process. In order to avoid errors against the indissolubility of marriage, such a hypothetical procedure would also demand an adequate preparation on the part of those who would render a decision in individual cases.” The abstract possibility of an administrative procedure for the declaration of marriage nullity (cf. cann. 50–51) surely did not imply that it could no longer refer only to a declarative decision on whether or not a valid marriage bond exists, but on the contrary to a decision according to what in the given circumstances would appear opportune and preferable. In fact, I stressed in the same article that neither the spouses nor the deciding authority have free disposition of the marriage bond.

however, seems to me somewhat ambiguous in this regard, when it states that the reformed process concerns “justice and mercy regarding the truth of the bond of those who have experienced matrimonial failure” and “the closeness of the Church to wounded families, desiring that the multitude of those who live the drama of marital failure are reached by the healing work of Christ through ecclesiastical structures.” Mercy for broken marriages requires that, when appropriate, the real possibility of a marriage process be offered—to be conducted with great humanity and delicacy—but the precise meaning of the expression “mercy regarding the truth of the bond” remains unclear to me. The tone of the introductions of the *motu proprio* and of the Rescript seem somewhat different.

4.2. Speeding Up and Simplifying the Judicial Process

The introduction of the *motu proprio* informs us, nonetheless, that Pope Francis, aware of the need to offer the faithful in many regions the real possibility of obtaining a just decision in a reasonable amount of time and without excessive difficulty, and in accord with the Final Report of the Extraordinary General Assembly of 2014, has taken steps to speed up and to simplify the process. For the Holy Father “the speed of the processes, along with the appropriate simplicity” is important. He is aware that the faithful in many countries “are too often separated from the legal structures of the Church due to physical or moral distance.” He clearly prefers an appropriately speedy judicial process that is possible everywhere, rather than maintaining a more perfect system that was, in many places, not possible. The fact that, in order to attain this goal, some guarantees for a just decision have fallen by the wayside has to be accepted as the consequence of this choice. The underlying idea seems to be this: better the risk of some wrong decisions than no (or few) decisions in certain regions.

4.3. The Suppression of the Requirement of a Double Conforming Affirmative Decision

A fundamental point of the reformed marriage process is the suppression of the requirement of a double conforming affirmative decision,¹² before someone is allowed to enter a “new” canonical marriage. This requirement

12. Cf. for this matter Joaquin Llobell, “Prospettive e possibili sviluppi della *Dignitas connubii*. Sull’abrogazione dell’obbligo della doppia sentenza conforme,” *Periodica* 104 (2015) 237–284.

was introduced by Benedict XIV on November 3, 1741 with the Constitution *Dei miseratione* in order to avoid mistakes in a matter of such great importance, namely to protect the indissolubility of marriage against the shoddy jurisprudence of several tribunals. The Code of 1917 confirmed this rule.

However, on April 27, 1970, the Council for the Extraordinary Affairs of the Church approved the so-called “American Norms,” by which the conference of bishops in the United States was granted the faculty to declare an affirmative first instance decision for the nullity of a marriage immediately executive.¹³ This was supposed to have been for exceptional cases, in which, according to the defender of the bond and the ordinary, a second instance was manifestly superfluous. But, as happens, the exception became the general rule, and in fact several hundreds of thousands of dispensations from the second instance were granted, even though the jurisprudence under the “American Norms” was considered by many as rather lax. For Australia and Canada as well there was some faculty given in the same matter.¹⁴

On March 28, 1971, however, Paul VI confirmed with *Causas matrimoniales* the requirement of the double conforming sentence, but simplified the procedure, rendering it possible to confirm by decree an affirmative first instance sentence after a short procedure in the second instance. When this rule appeared in the drafts for the new Code, it elicited a strong reaction, especially from Anglo-Saxon countries,¹⁵ but to no avail. In effect, after the codification of 1983, these countries had to reconstitute their appellate tribunals. Experience shows that, in those tribunals, the handling of cases in second instance was, even up to this day, often merely formalistic and very superficial.

A discussion on this matter began again, this time also in Europe, at the time of the drafting of *Dignitas connubii*. The second commission under the guidance of Cardinal Pompedda proposed a rather moderate exception to the obligation of the double conforming sentences,¹⁶ but

13. Cf. Ignacio Gordon and Zenon Grocholewski, *Documenta recentiora circa rem matrimonialem et processualem* (Rome: s.n., 1977) 1: 242–256.

14. Cf. *ibid.*, 259–260; Grocholewski, *Documenta recentiora*, 2: 126–132.

15. Cf. Pontificium Consilium de Legum Textibus Interpretandis, *Congregatio Plena-ria Diebus 20–29 octobris 1981 habita* (Vatican City: Typis Polyglottis Vaticanis 1991) 98–127 and 230–278.

16. Pontificia Universitas Gregoriana, *Instructionis Dignitas connubii synopsis historica* (Rome: s.n., 2015), see 241 and 243 for art. 43 of the “Novissimum Schema”: “§1. Ius novas

his schema was not accepted. As is well known, the Instruction could not change the 1983 Code.

According to the Final Report of the Extraordinary General Assembly of 2014, however, a great number of members insisted on “the dispensation of the requirement of second instance for conforming sentences.” The first criterion of the *motu proprio* answers their desire: “First of all, it seemed that a double conforming decision in favor of the nullity of a marriage was no longer necessary to enable the parties to enter into a new canonical marriage. Rather, moral certainty on the part of the first judge in accord with the norm of law is sufficient.”

As indicated, the requirement of the double conforming sentence had the goal of avoiding errors in a matter of such great importance. Honest judges know that, even in good faith, an error is possible, and they are encouraged when their judgments are confirmed in second instance. The fact that their judgment had to go before a further instance was also an inducement for them to fulfill their task and to write up the sentences with care.¹⁷ As a consequence, their judgment could, in many cases, be confirmed by a decree after a short procedure in the second instance.¹⁸ To conclude from this fact, as Professor Llobell does, that the obligatory second instance had become pure formalism in a great percentage of cases, seems to me an exaggeration.¹⁹ I must admit, as I said before, that in a number of

nuptias contrahendi oritur ex duplici decisione conformi . . . ; §2. Normae, de qua in §1 superiore, ipso iure derogatur tantummodo si: 1° causa a tribunali collegiali definita sit; 2° iudicium collegium insuper votum favorable exprimat; 3° nec partes aut defensor vinculi sese opponant; 4° accedit denique consensus Moderatoris tribunalis primae instantiae.”

17. Gordon Read, “Pope Francis simplifies and speeds up the process for declaring marriages null,” *Canon Law Society of Great Britain and Ireland Newsletter* 183 (September 2015) 8–10, although welcoming the “removal from the process of the mandatory appeal” (sic), observes nevertheless: “The downside is that there will be a lack of ‘quality control’ except in the small number of cases appealed by one of the parties.” Roch Pagé, “Reflections of a Judicial Vicar of an Appeal Tribunal on the Proposed Reform of the Canonical Matrimonial Process,” *The Jurist* 75 (2015) 59–69, was not in favor of the abolition of the mandatory double conforming sentence (cf. 64–65).

18. According to the *Statistical Yearbook 2013* in that year the tribunals treated 30,061 cases in second instance, issuing 28,478 affirmative decisions, 21,007 by decree and 7,471 by sentence. It has to be noticed that the affirmative sentences are referring not only to affirmative but also to reversed negative first instance sentences, just like eventual negative second instance sentences may refer to affirmative but also to negative first instance decisions.

19. Llobell, 281–282: “può essere molto efficace l’abrogazione dell’obbligo della doppia sentenza conforme perché in un’alta percentuale di casi è divenuta ‘puro formalismo’.”

tribunals this was indeed pure formalism,²⁰ but there has also been some significant improvement in recent years as the result of the patient work of the Apostolic Signatura. Moreover, the obligation of a double conforming affirmative sentence often contributed to avoiding a considerable number of mistakes in the remaining percentage of cases.²¹ Experience indeed shows that in several places serious appellate tribunals often overturned rather weak first instance decisions that had been given in favor of the nullity of a marriage.

On the other hand, it must be said that the suppression of the double conforming affirmative sentence will have the effect that much of the second instance personnel will be freed up to accelerate the first instance processes and even to constitute first instance tribunals where these are still lacking. For this reason, I welcome the new rule, though with some hesitation.

Indeed, much will depend on the seriousness and professionalism of the first instance judges and especially on whether or not the defenders of the bond will take up their responsibility to appeal against unconvincing sentences. I regret to say that experience teaches that flawed jurisprudence in a tribunal often goes hand-in-hand with a shoddy defense of the bond.²² Only time will tell if, and to what degree, the advantages of the suppression of the double conforming affirmative sentence might compensate for doing away with a guarantee that sought to foster sound jurisprudence,

20. In the archives of the Apostolic Signatura there are several examples of the whole acts of second instance consisting in one pre-stamped page, in which only the number of the case, the names of the spouses, some check marks by the defender of the bond and the signatures of the judges and notary and the date had to be filled out. The annual reports show also that many tribunals never admitted a case to ordinary examination; one U.S.A. interdiocesan tribunal of appeal, for instance, issued 2,622 decrees of confirmation and not a single sentence, while no case ended through renunciation or peremption, in the year 2000 (cf. prot. n. 1116 SAT); in 2015, another U.S.A. Tribunal with eight judges issued not only 254 affirmative sentences in the first instance, but moreover 1,018 decrees of confirmation and one affirmative sentence in the second instance (cf. prot. n. 1134 SAT). One cannot understand, even in good faith, how only eight judges with such a heavy case-load in first instance could seriously study as collegiate tribunal all those cases in second instance.

21. This can be seen, for instance, from the petitions for a *Commissio Pontificia* from Poland that arrived at the Apostolic Signatura in 2015, where, in at least fifty of those cases, the second instance issued a negative sentence after an affirmative first instance decision.

22. Page, 65, contends that under the so called "American Norms" "the role of the Defender of the Bond was reduced to some insignificant formality and if the Defender challenged the decision of the Tribunal, he often found himself *persona non grata*. Some tribunals would even go so far to substitute the Defender of the Bond following the sentence to prevent any appeals."

even when this guarantee was not taken seriously in many appellate tribunals.

4.4. The Diocesan Bishop as Judge

The Final Report of the 2014 Extraordinary General Assembly states in n. 49: “With respect to marriage cases, the streamlining of the procedure requested by many synod fathers, in addition to the preparation of a sufficient number of persons—clerics and lay people—primarily dedicated to this work will require increased responsibility of the diocesan bishop,” while earlier, in n. 48, there was mention of “the jurisdiction of the diocesan bishop” with reference to the proposed possibility of administrative means. The third criterion for reforming the marriage nullity process (“The bishop himself as judge”) goes much further:

In order that a teaching of the Second Vatican Council regarding a certain area of great importance finally be put into practice, it has been decided to declare openly that the bishop himself, in the church over which he has been appointed shepherd and head, is by that very fact the judge of those faithful entrusted to his care. It is thus hoped that the bishop himself, be it of a large or small diocese, stand as a sign of the conversion of ecclesiastical structures, and that he does not delegate completely the duty of deciding marriage cases to the offices of his curia.

The Constitution *Lumen gentium* of the Second Vatican Council states indeed in n. 27 that the *sacra potestas* of a bishop includes his duty before the Lord to render judgment. And according to traditional canonical doctrine, can. 1419 §1 states that in each diocese the diocesan bishop is the judge in the first instance and may exercise his judicial power either personally or through others, primarily the judicial vicar (who does not act with delegated, but vicarious power).

The most important question, though, is not whether bishops are exercising judicial power personally, but whether they are seeing to the functioning of their tribunals: preparing qualified ministers, providing all the necessary means for their speedy operation, monitoring their activity, and not indulging any laxism whatsoever.²³ When Pope Francis gently warns

23. According to the second fundamental criterion, the constitution of a single judge in the first instance is “committed to the responsibility of the bishop, who in the pastoral exercise of his judicial power is to take care that no laxism whatsoever is indulged.”

his brother bishops that they should “stand as a sign of the conversion of ecclesiastical structures,” then, in my estimation, this warning should concern not so much the personal exercise of their judicial power, but rather it should concern those bishops who are not seeing to it that their faithful are served by a working and accessible judicial structure or, if there is a tribunal, are not caring for it. There is some danger of forgetting this fundamental concern by focusing on the personal exercise of judicial power by the bishops, all the more since this was always allowed, observing the rules of procedural law (cf. can. 1419 §1). However, it is often the case that diocesan bishops do not have adequate preparation for personally exercising their judicial power.

At any rate, Pope Francis links the conversion of ecclesiastical structures especially to the briefer process, in which the bishop is acting personally as judge.

4.5. The Briefer Process

The Final Report of the Extraordinary General Assembly of 2014 states in n. 48 that the synod fathers proposed also “a simple process to be used in cases where nullity is clearly evident.” Pope Francis focuses on this matter explaining the fourth criterion for the reform:

aside from expediting the ordinary process for the declaration for the declaration of nullity, a form of briefer process is designated—in addition to the current documentary procedure—to be applied in cases in which the alleged nullity of the marriage is supported by particularly clear arguments. It has not totally escaped us that a briefer process can endanger the principle of the indissolubility of marriage. For precisely this reason we have chosen that in such a procedure, the judge is to be the bishop himself, who, due to his pastoral office, is with Peter the greatest guarantor of Catholic unity in faith and discipline.

Although its celerity is modeled on the oral process (cf. cann. 1656–1670), the briefer process is quite distinct from it: the judicial vicar decides whether or not this process can be used; the instructor, and not a judge, collects the proofs in a single session; after that session the diocesan bishop, having consulted with the instructor and the assessor and having considered the observations of the defender of the bond and, if there are any, the defense briefs of the parties, is to issue the sentence, if moral certitude about the nullity of marriage is reached (cf. cann. 1685–1687). It is clear that

such a process places a heavy burden on diocesan bishops, who have many other duties and often lack adequate preparation in canon law and experience in judging matrimonial cases, which as a rule are in no way easy to judge. It should also be noted that, even when the principle of proximity between the parties and the judge is, as far as possible, observed (cf. art. 19 of the Procedural Rules), this procedure makes no provision for any direct contact between the bishop judging the case and the parties involved.

On the other hand, the briefer process should be rather rare, due to the two essential conditions for this kind of process: one, the consent of both spouses is required; two, the case should not demand a more accurate inquiry or investigation, since the circumstances of facts and persons, with substantiating testimonies and records, must make the nullity of the marriage plainly evident from the outset (cf. can. 1683). That the consent of both spouses is required does not mean that this process introduces some kind of “annulment” of a marriage with the consent of both spouses, but that, as in the oral process, both have to agree to the abbreviation of their exercise of the right of defense in this procedure. If one of the spouses does not agree (explicitly or through lack of reply), it will be, moreover, very difficult for the nullity of the marriage to be clearly manifest from the outset. With regard to the second condition, however, some difficulty arises from art. 14 §1 of the procedural rules, which offers an open-ended list of circumstances of things and persons that could allow a case to be handled by the briefer process. In fact this list contains some grounds of nullity—the allegation of which by itself does not render the nullity of marriage manifest—and many circumstances, which—perhaps for some particular case—might not demand a more accurate investigation. This list, however, in no way offers clear-cut cases for the briefer process.²⁴

24. The first example of this list: “the defect of faith which can generate simulation of consent or error that determines the will.” Apart from the fact that in such cases the nullity of marriage is generally not at all evident from the outset, it is interesting to note that the Final Report of the Extraordinary Synod (n. 48) mentions that, “Among other proposals, the role with faith plays in persons who marry could be possibly be examined by ascertaining the validity of the Sacrament of Marriage, all the while maintaining that the marriage of two baptized Christians is always a sacrament.” Pope Francis, however, was clear in his allocution to the Roman Rota of January 22, 2016, reminding that: “It must be clearly stated that the quality of faith is not an essential condition of matrimonial consent, which, according to perennial teaching, can be undermined only at the natural level (cfr. CIC, can. 1055 §1 and 2). In fact, the *habitus fidei* is infused at the moment of Baptism and continues to have its mysterious influence in the soul, even when faith is not developed and seems to be absent psychologically. It is not uncommon that couples ready to marry, urged toward true marriage by

Wise and experienced ecclesiastical judges may have encountered in their career some rare case in which the nullity of marriage was manifest from the very start: for instance, because authentic medical documents were attached to the *libellus*, proving the clinical institutionalization of one of the spouses before and after the celebration of the marriage due to a most severe psychological illness. However, such rare cases would have been decided rather quickly anyway by the ordinary process.

At any rate, the Final Report of the Extraordinary General Assembly of 2014 suggested the introduction of a simple process to be used in cases where nullity is clearly evident. Pope Francis introduced this briefer process, but, aware that it can endanger the principle of the indissolubility of marriage, stated that the judge then has to be the bishop himself, as guarantor of Catholic unity in faith and discipline.

4.6. Insofar as Possible Free of Charge

The Final Report of the Extraordinary General Assembly of the Synod of Bishops emphasized “the need to make the procedure in cases of nullity . . . , if possible, at no expense” (n. 48). In this regard Pope Francis, in the sixth criterion for the reform, enjoins conferences of bishops that they “should ensure, to the best of their ability and with due regard for the just compensation of tribunal employees, that processes remain free of charge, and that the Church, showing herself a generous mother to the faithful, manifest, in a matter so intimately tied to the salvation of souls, the gratuitous love of Christ by which we have all been saved.” The competence given in this regard to conferences of bishops does not seem in full harmony with the remaining prescript of can. 1649 about the proper responsibility of the bishop moderator (or the group of bishops for an interdiocesan tribunal) in this matter.

While the obligation of a just and fair remuneration of the ministers and staff of the tribunals is rightly affirmed, the principle of gratuity completely turns on its head the contrary statement of *Dignitas connubii*, art.

the *instinctus naturae*, should have a limited awareness of the fullness of God’s project at the moment of the celebration, and only later, in the life of family, should discover all that God, Creator and Redeemer, has prepared for them. Shortcomings of formation in the faith and even error concerning unity, indissolubility and the sacramental dignity of marriage vitiate matrimonial consent only if they determine the will (cfr. CIC, can. 1099). For precisely this reason, errors regarding the sacramentality of matrimony must be very carefully evaluated” (my translation from the Italian original).

302: “The parties are bound to contribute to paying the judicial expenses according to their ability.” The same Instruction nevertheless stressed the right of the poor to obtain full exemption from the judicial expenses and the right of those who are unable to pay the full expenses to obtain partial exemption (cf. art. 305 DC) and that the faithful never should be kept away from the ministry of the tribunal by excessive expenses (cf. art. 308 DC). It has happened, even recently, that the tribunal fee for an interdiocesan tribunal was four times the minimal monthly wage.²⁵ As a first reaction to the *motu proprio*, several dioceses, especially in the United States, dropped tribunal fees altogether, inviting the parties to offer a freewill contribution when the sentence is issued. It should be noted, however, that in the new body of canons (cann. 1671–1691) there is no mention of judicial expenses. In other words, this fundamental criterion for reform appears to be a point to be kept in mind when the bishops issue particular norms in this matter.

At any rate, that cases be free of charge insofar as possible will doubtless make the matrimonial processes more accessible for many of the faithful.

4.7. Proximity to the Parties

The Final Report of the Extraordinary General Assembly also emphasized “the need to make the procedure in cases of nullity more accessible” (art. 48). In the sixth criterion for reform, Pope Francis warns conferences of bishops to respect absolutely “the right of the bishops to organize judicial power in their own particular churches” and speaks of the “restoration of the proximity between the judges and the faithful.” As I mentioned above, the procedural rules endorse the principle of proximity regarding the equivalent titles of competence of tribunals (art. 7 §1) and stress the task of a bishop without his own tribunal to see to—as soon as possible—the formation of tribunal ministers who can assist in setting up a tribunal, while bishops retain the right to withdraw from an interdiocesan tribunal

25. Cf. the letter of December 1, 2015 of a Brazilian diocesan bishop to the Apostolic Signatura (prot. n. 2106 SAT).

of first instance (art. 8).²⁶ And the fifth criterion for the reform states that it is ‘appropriate that the appeal to the metropolitan see be restored’.²⁷

On the other hand, can. 1673 §2 of the *motu proprio* continues to acknowledge the faculty of the diocesan bishop to approach a nearby interdiocesan tribunal, and can. 1673 §3 presupposes the legitimacy of interdiocesan appellate tribunals.

It would seem that the *motu proprio*, in both the criteria and the procedural rules, takes into consideration those countries where interdiocesan tribunals are common and ignores those places where the system of diocesan tribunals and appeal to the metropolitan see is longstanding, and hence without any need of restoration.

I offer only two observations: first, the Apostolic Signatura, in order to ensure the proximity of the tribunals to the parties, has a longstanding practice of recommending that instructory sections be set up in each diocese of an interdiocesan tribunal of first instance, a possibility consequently mentioned in art. 23 §2 of *Dignitas connubii*; second, in many places the interdiocesan tribunals remain, at least for the moment, the most realistic way to offer the faithful the service of justice. There are indeed many dioceses, including many metropolitan sees, which do not have a working tribunal and are not able to constitute one in the near future, or even to constitute collegial tribunals for second instance cases.

It is thus up to individual bishops to see how, in the concrete circumstances of their dioceses, they can best promote the desired proximity to the parties.

5. Conclusion

I strongly welcome the fact that for the cases of marriage nullity no administrative process was introduced by the new *motu proprio*, and that the

26. An interesting example is that of South Korea: the system of interdiocesan tribunals was already given up years ago for a system of diocesan tribunals appealing to the metropolitan see, once the single dioceses were ready for this step: cf. the decree of the Apostolic Signatura of 23 January 2008, prot. nn. 3100-3117/08 SAT.

27. Notice reached the Apostolic Signatura of the suppression of some interdiocesan appellate tribunals and the restoration of the appeal to the metropolitan see, since the suppression of the need for a double conforming decision for the nullity of marriage the caseload in second instance will be much reduced and hence the metropolitan tribunal will be again able to handle cases in second instance.

process remains a judicial one, which offers the best guarantees for discovering the truth concerning the marriage bond and protecting its indissolubility. Even though there may be some perplexity concerning some points of the reform, it cannot be denied that it constitutes a stringent challenge for diocesan bishops to see to it that there be working structures nearby, allowing the faithful everywhere to approach an ecclesiastical tribunal when they have a doubt about the validity of their marriage and to obtain a decision according to the truth in good time, while not being kept away because of financial expense. It is also important to note that Pope Francis challenges the bishops to be guarantors of Catholic faith and discipline in their tribunals. Just as in the past, much will indeed depend on sound jurisprudence, which presupposes well prepared and properly qualified ministers of justice with the correct *sensus Ecclesiae*.

For many years it has been the pressing concern of the Apostolic Signatura that the faithful everywhere should have the real possibility of approaching a functioning ecclesiastical tribunal when there is a serious doubt about the validity of their marriage and to obtain a just decision in a reasonable time and without excessive expense—and for the poor, without any expense at all. Some progress has been made in resolving this problem, but even up to now not in a very significant way. As I have been working for almost thirty years to reach this goal and the end of my term of office is approaching, I can only express the hope that the reform of the marriage process will be successful.

Many bishops in the recent meetings of the Synod of Bishops criticized the existing matrimonial nullity process; Pope Francis is now challenging them to make his reform of the process work.

ABSTRACT

After a short preliminary part that concerns especially the state and activity of ecclesiastical tribunals in the world, the author offers a brief presentation of the motu proprio Mitis Iudex Dominus Iesus. In the third part of the contribution, the author considers the intention behind the reform and some of its key points and compares these elements with the Final Report of the Extraordinary General Assembly of the Synod of Bishops of 2014. The author emphasizes that it is too early for an in-depth study of the matter and that the exposition is only a first approach. He strongly welcomes

the fact that for the cases of marriage nullity no administrative process was introduced by the new motu proprio, and that the process remains a judicial one, which offers the best guarantees for discovering the truth concerning the marriage bond and protecting its indissolubility. The author concludes by stating that many bishops in the recent meetings of the Synod of Bishops criticized the existing matrimonial nullity process and that Pope Francis is now challenging them to make his reform of the process work.
